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No. 94-1040

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CITY OF DEARBORN,

Petitioner,

v.

RONALD LOSCHIAVO and DONNA LOSCHIAVO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INC. AND THE MICHIGAN MUNICIPAL LEAGUE FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI

The National Institute of Municipal Law Officers, Inc. ("NIMLO") and the Michigan Municipal League move this Court, pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, for leave to file the accompanying brief *amici curiae.* Petitioner City of Dearborn ("Dearborn") consents to, and respondents Ronald and Donna Loschiavo do not oppose, the filing of this brief.

I.
IMPORTANCE OF THE ISSUES

The principal issue raised by Dearborn's Petition for Writ of Certiorari is whether an individual has a federal cause of action under 42 U.S.C. §1983 against state or local zoning authorities if their ordinances are deemed to be preempted by 47 C.F.R. §25.104, a regulation of the Federal Communications Commission ("FCC") regarding satellite dishes.

Traditionally, individuals seeking to challenge municipal zoning ordinances avail themselves of state and local causes of action and remedies. In the event that they allege that the ordinance violates the proper distribution of powers within the federal system, they can seek to have the ordinance preempted. The Sixth Circuit's ruling below creates a separate cause of action under 42 U.S.C. §1983 against state or local zoning authorities if such an ordinance is preempted by 47 C.F.R. §25.104. As a result of that decision, not only will the resulting preemption bar municipal authorities from enforcing their zoning ordinances, but it could subject zoning authorities to a 42 U.S.C. §1983 cause of action resulting in federal liability for damages and attorney's fees. The threat of such liability could well result in altering local authorities' reasonable discretion to regulate the installation of satellite dishes as contemplated and permitted by the FCC regulations, effectively undermining local ability to administer residential zoning regulations for the benefit of its citizenry.

II.
INTEREST OF *AMICI*

NIMLO, a national organization comprised of more than 1,500 local governments, municipalities and other political subdivisions of states, is operated by the chief legal officers of its members who are responsible for advising local governments on the best methods of promoting the health, safety, and welfare of their citizens through the regulation of matters of local and municipal concern. The Michigan Municipal League, representing some 509 Michigan cities and villages, is a non-profit corporation whose purpose is to improve municipal government and administration through cooperative effort.

NIMLO and the Michigan Municipal League are vitally interested in ensuring that municipalities are not unnecessarily and improperly subject to federal liability for damages and attorney's fees resulting from a 42 U.S.C. §1983 cause of action. The underlying opinion from the Sixth Circuit permits such an outcome.

WHEREFORE, NIMLO and the Michigan Municipal League respectfully request that their Motion for Leave to File Brief *Amici Curiae* in Support of Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*

This *amici curiae* brief is filed on behalf of the more than 1,500 local governments that are members of the National Institute of Municipal Law Officers, Inc. ("NIMLO"), as well as the some 509 Michigan cities and villages that are members of the Michigan Municipal League. The composition of this collective membership demonstrates that *Amici* have a compelling interest in decisions, such as that of the Sixth Circuit, which adversely affect local governments.

NIMLO is a national organization comprised of municipalities and other political subdivisions of states. NIMLO is operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, and such other legally related titles. These attorneys are responsible for advising local governments on the best methods of promoting the health, safety, and welfare of their citizens through the regulation of matters of local and municipal concern. These attorneys also represent their governments in litigation resulting from the enforcement of such regulations.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is to improve municipal government and administration through cooperative effort. Among its cooperative efforts is the Michigan Municipal League Legal Defense Fund, ("Legal Defense Fund"), which the Michigan Municipal League operates through a Board of Directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

The Sixth Circuit decision has broad implications beyond the authority of a state or local government to regulate satellite dishes. That decision imposes an enormous potential liability on state and local zoning authorities, causing grave concern for the municipalities and their respective legal officers throughout the country that *Amici* represent. *Amici* are well-situated to provide this Court with a perspective on the public policy considerations raised by this decision.

SUMMARY OF ARGUMENT

At issue in this case is no less than the time-honored police power of municipalities to foster and protect the health, safety, aesthetics and welfare of their citizens through the establishment of zoning regulations. Although the courts traditionally have zealously defended the exercise of such police powers, the Sixth Circuit determined that individuals have a federal cause of action under 42 U.S.C. §1983 against state or local zoning authorities whenever their ordinances are deemed to be preempted by 47 C.F.R. §25.104, a regulation of the Federal Communications Commission ("FCC") regarding satellite dishes. As a result of the court of appeals' decision, not only will the resulting preemption bar local authorities from enforcing their zoning ordinances, but it could subject such authorities to a 42 U.S.C. §1983 cause of action resulting in federal liability for damages and attorney's fees. The resulting chilling effect on state and local governments' police power is particularly disturbing because the regulatory scheme of 47 C.F.R. §25.104 does not appear to create a cause of action under 42 U.S.C. §1983. Instead, that scheme permits several types of alternative remedies to homeowners seeking to challenge satellite dish zoning ordinances. Moreover, given that the standard on which such preemptions are based tends to fluctuate, there is no clearly defined basis for state and local authorities to foresee what ordinances will be preempted and may be subject to liability from 42 U.S.C. §1983.

In addition, the Sixth Circuit's opinion conflicts with the Ninth Circuit's decision in *Johnson v. City of Pleasonton,* which upheld a lower court's ruling that no 42 U.S.C. §1983 cause of action exists for a local zoning ordinance similarly preempted by 47 C.F.R. §25.104.

If this Court does not resolve the resulting ambiguity, similarly-situated parties throughout the United States are likely to file suit in federal court to assert their putative rights under 42 U.S.C. §1983.

ARGUMENT

I.

ALLOWING THE SIXTH CIRCUIT DECISION TO STAND WILL IMPEDE STATE AND LOCAL GOVERNMENTS' POLICE POWER.

The Sixth Circuit's ruling creates a cause of action under 42 U.S.C. §1983 against state or local zoning authorities if their ordinances are deemed to be preempted by 47 C.F.R. §25.104.[1] As a consequence of the court of appeals' decision, if a state or local zoning authority regulating the installation of satellite dishes miscalculates the delicate balance between (1) fostering and protecting the health, safety, aesthetics, and welfare of its citizens, and (2) avoiding an "unreasonable" infringement on the federal interest in the reception of satellite signals, not only will the resulting preemption bar local authorities from enforcing their zoning ordinances, but it could subject such authorities to a 42

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[1] 47 C.F.R. §24.104 states, in pertinent part:

State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:

(a) Have a reasonable and clearly defined health, safety or aesthetic objective; and

(b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

U.S.C. §1983 cause of action resulting in federal liability for damages and attorney's fees. The threat of such liability could well alter local authorities' reasonable discretion to regulate the installation of satellite dishes as contemplated and permitted by the FCC, effectively undermining local ability to administer residential zoning regulations to the detriment of a state's citizenry.

The ruling below's chilling effect on state and local governments' police power is all the more disturbing given that the regulatory scheme created by 47 C.F.R. §25.104 does not appear to create a 42 U.S.C. §1983 cause of action.[2] The exercise of police power, such as the establishment of zoning regulations, is the sovereign right of a government to promote order, safety, health, morals, aesthetics, and general welfare within constitutional limits and is an essential attribute of government.[3] In the interest of federalism, police powers of the states are not to be infringed absent an unambiguous federal intent.[4]

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[2] *See Johnson v. City of Pleasanton*, 781 F.Supp. 632 (N.D. Cal. 1991), *aff'd* 982 F.2d 350 (9th Cir. 1992) (no private right of enforcement exists under 42 U.S.C. §1983 for a local zoning ordinance preempted by 47 C.F.R. §25.104); *see also Abbott v. City of Cape Canaveral*, 840 F. Supp. 880, 886 (D.C.M.D. Fla. 1994) ("the right to receive satellite television programming of one's choice is not a fundamental right [that leads to the creation of a 42 U.S.C. §1983 cause of action]").

[3] *See, e.g., Brendale v. Yakima Indian Nation*, 492 U.S. 408, 433 (1989) ("Zoning is a process whereby a community defines its essential character. Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually – or more often – unilaterally destructive."); *see also Black's Law Dictionary* 1317 (4th ed. 1968).

[4] *See Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 715 (1985) *citing Jones v. Rath Packing Co.*, 430

[footnote continued]

In adopting only a limited preeemption, the FCC clearly intended to preserve, to the greatest extent possible, the ability of state and local governments to regulate health, safety, and aesthetic goals through their zoning ordinances.[5] The FCC expressly envisioned leaving state and local governments free to regulate satellite reception up to and until such regulations are deemed "unreasonable."[6] It stated that, so long as they have a reasonable and clearly defined health, safety or aesthetic objective:

> Non-federal regulations may impose, under our adopted rule, reasonable requirements on all antennas as long as these local standards are uniformly applied and do not single out satellite receive-only facilities for different treatment.

Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, Report and Order, 51 Fed. Reg. 5519 at para. 32. If such non-federal regulations are deemed to "unreasonably" interfere with satellite reception, they are preempted. At least one

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U.S. 519, 525 (1977) *and quoting Rice v. Santa Fe Elevator Corp.*, 450 U.S. 662, 670 (1981).

[5] *See, e.g.*, 47 C.F.R. §25.104(a); *see also Preemption of Local Zoning or Other Regulation of Receive Only Satellite Earth Stations*, 2 FCC Rcd 202 (1987) ("because of the traditional local interest in land use regulation, we decided to adopt a limited preemption which would protect the federal interest in assuring access to interstate satellite-delivered signals which in turn would allow local governments reasonable flexibility in administering zoning plans.")

[6] *See* 47 C.F.R. §25.104(b); *accord Abbott v. City of Cape Canaveral*, 840 F. Supp. at 885 (upholding defendant's argument that 47 C.F.R. §25.104 contemplates allowing local ordinances to interfere with satellite reception until they prevent satellite telecommunications from competing with other modes of telecommunications).

federal court has held that this preemption remedy precludes an additional private cause of action under 42 U.S.C. §1983.[7]

The regulatory scheme created by the FCC in adopting 47 C.F.R. §25.104 permits several types of remedies for injured parties other than 42 U.S.C. §1983. First, plaintiffs can avail themselves of traditional state remedies for appealing local zoning decisions. Second, injured parties do not need 42 U.S.C. §1983 to assert that a zoning ordinance violates the proper distribution of powers within the federal system and should be preempted.[8] Third, parties can seek relief, including damages and/or injunctive remedies, from the FCC.[9]

The Sixth Circuit's imposition of a 42 U.S.C. §1983 cause of action in this context is also of grave concern to state and local governments because it will threaten such entities with federal liability when the only "wrong" committed is misapprehending the precise location of

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[7] *Johnson v. City of Pleasanton*, 781 F. Supp. at 645 ("a private cause of action has arguably been denied . . . by the FCC's provision of an 'alternative' remedy through the preemption provisions of Section 25.104."); *accord Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) ("Given the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to §1983 exists every time a federal rule of law preempts state regulatory authority.")

[8] *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. at 114 (Kennedy, J., dissenting, in which Rehnquist, C.J., and O'Connor, J., joined).

[9] *See, e.g., Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, New York*, 7 FCC Rcd. 2172 (1992) (FCC granted declaratory ruling that ordinance was preempted under 47 C.F.R. §25.104), *reversed on other grounds, Town of Deerfield v. FCC*, 992 F.2d 420 (2nd Cir. 1993); *see also* 47 U.S.C. §501 *et seq.*

the boundary between state and federal power.[10] While the threat of such liability would be troubling in any context, it is of particular concern where there is no clearly defined basis for state and local authorities to foresee what may constitute "unreasonable" interference warranting preemption under 47 C.F.R. §25.104.

Indeed, it was to avoid this sort of harm that led this Court to establish the test described in *Wilder v. Virginia Hospital Assoc.*, 496 U.S. 498, 509 (1990) requiring, *inter alia*, that the federal law at issue must create an interest that is sufficiently specific to create an enforceable right under 42 U.S.C. §1983. Absent such foreseeability, defendants could find themselves liable for damages and attorneys fees due to a vague or fluctuating federally articulated standard.

The decision below unreasonably subjects state and local governments to liability from a 42 U.S.C. §1983 action based on such a vague or fluctuating standard. Creating a 42 U.S.C. §1983 cause of action based on whether an ordinance is "reasonable" is frequently tenuous.[11] This is particularly true with regulations governing the satellite industry, such as the one at issue here, where rapid technological changes and the attendant modifications to such regulations can quickly alter whether a zoning ordinance's maximum diameter limitations for receive-only satellite dishes are reasonable. For example, several years ago when, depending on its

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[10] *Accord Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. at 114 (Kennedy, J., dissenting, in which Rehnquist, C.J., and O'Connor, J., joined).

[11] *See, e.g., Suter v. Artist M.*, 112 S.Ct. 1360, 1368 (1992) (declining to find a 42 U.S.C. §1983 cause of action where the regulations at issue provided no guidance as to the type of "reasonable" regulation that would be considered acceptable).

location, a dish had to be approximately eight feet in diameter to adequately receive video signals transmitted by satellites, an ordinance prohibiting the installation of dishes greater than six feet in diameter would have effectively precluded reception, been deemed "unreasonable", and been subject to preemption by 47 C.F.R. §25.104.[12] With the recent introduction of Direct Broadcast Satellite technology that utilizes higher powered satellites, dishes need only be eighteen inches in diameter to adequately receive 150 channels of satellite video signals. The advent of such technology has the effect of transforming the aforementioned ordinance from being "unreasonable" to becoming "reasonable".[13]

In sum, the Sixth Circuit's creation of a 42 U.S.C. §1983 cause of action in this case has profound and unnecessary adverse effects on the exercise of police powers by the nation's state and local zoning authorities to the ultimate detriment of their citizenry. *Amici* respectfully submit that these consequences are sufficiently critical to warrant further review by this Court.

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[12] *See Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5,519 at n.77 (1986).

[13] *Id. Cf. Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, 50 Fed. Reg. 35228 (Aug. 30, 1985) (the FCC's decision to allow satellites in orbit to be spaced two, rather than four, degrees apart increased the maximum diameter needed by some dishes to ensure satellite video reception, absent further technological advances, thereby potentially causing a previously "reasonable" ordinance to become "unreasonable.")

II.

ALLOWING THE SIXTH CIRCUIT DECISION TO STAND IS LIKELY TO INCREASE DRAMATICALLY AND UNNECESSARILY THE NUMBER OF DECISIONS THAT FEDERAL COURTS WILL HAVE TO HEAR.

In creating an enforceable right under 42 U.S.C. §1983 for the preemption of a local zoning ordinance by federal regulation 47 C.F.R. §25.104, the Sixth Circuit's decision conflicts with the Ninth Circuit's decision in *Johnson v. City of Pleasanton*, which upheld a lower court's ruling that no private right of enforcement exists under 42 U.S.C. §1983 for a local zoning ordinance similarly preempted by 47 C.F.R. §25.104. This split between the circuits creates a legal ambiguity as to whether 47 C.F.R. §25.104 creates an enforceable right under 42 U.S.C. §1983.

If this Court does not resolve this ambiguity, similarly-situated parties throughout the United States are likely to file suit in federal court to assert their putative rights under 42 U.S.C. §1983. For example, because of the Sixth Circuit's holding, homeowners seeking to install or maintain receive-only satellite dish antennas undoubtedly will be incented to challenge local zoning ordinances in federal court asserting an enforceable right under 42 U.S.C. §1983 in order to recover damages and attorney's fees. Individuals may also rely on the Sixth Circuit opinion to challenge ordinances arguably preempted by the FCC's regulation of Satellite Master Antenna Television ("SMATV") systems,[14] amateur radio towers,[15]

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[14] *Earth Satellite Communications, Inc.*, 95 FCC 2d 1223 (1983), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984). SMATV transmits television signals from satellites directly to satellite receiving stations atop multi-unit dwellings.

[15] *See, e.g., Howard v. City of Burlingame*, 937 F.2d 1376 (9th Cir. 1991) (appellee asserted a cause of action under 42

[footnote continued]

as well as antenna towers for cellular telephone, paging, and personal communications service ("PCS"),[16] that the Commission is currently contemplating preempting.[17] In light of the array of local, state and federal remedies already available, the ability to assert a private right of action under 42 U.S.C. §1983 in such suits is duplicative and unnecessary.

Moreover, given that the FCC expressly declined to preempt local zoning ordinances that do not "single out" satellite receive-only dishes, the Sixth Circuit's decision may create a perverse incentive for local governments to enact zoning ordinances prohibiting or restricting all types of antennas, not just receive-only satellite dishes. Such ordinances would avoid the preemption[18] on which the Sixth Circuit's creation of a 42 U.S.C. §1983 cause of action relied. Such revised ordinances are likely to

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U.S.C. §1983 where the appellant city's zoning powers over amateur radio towers were partially preempted by the FCC.

[16] PCS is a family of mobile radio communications services and devices that range from advanced wireless replacements for ordinary telephones to radio communications devices capable of sending and receiving voice and data virtually anywhere. *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 8 FCC Rcd 7700, 7710-12 (1993).

[17] *See* Cellular Telecommunications Industry Association, Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting for Commercial Mobile Service Providers, Petition for Rule Making (FCC, filed Dec. 22, 1994).

[18] *See* 51 Fed. Reg. at 5,526 (partial dissent of FCC Commissioner Mimi Weyforth Dawson noting that the FCC's adoption of 47 C.F.R. §25.104 created an "enormous loophole . . . since blanket bans against all antennas . . . are entirely permissible under the majority's rule").

spawn a host of additional legal challenges that will have to be addressed by the courts.

By definitively ruling that 47 C.F.R. §25.104 does not create an enforceable right under 42 U.S.C. §1983, this Court can prevent the filing of a multitude of unnecessary suits, in the federal district and circuit courts as well as those eventually reaching this Court, that the decision below will encourage.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that a writ of certiorari should issue to review the judgement below.

Respectfully submitted,

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